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Subject: Opera Software's reaction to proposed settlement DOJ-Microsoft Corp.

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This memorandum outlines Opera Software ASA's view on the proposed settlement on the case US Department of Justice (hereinafter "DOJ") vs. Microsoft Corp.

1. INTRODUCTION

The Norwegian company Opera Software ASA has on an equal footing with Netscape been systematically targeted by Microsoft Corp. by way of illegal business practices in order to monopolize the browser market. Although Opera Software has created critically acclaimed browser technology, the Company is completely dependent on an open market where free and fair competition sets the criteria needed for success. Opera Software ASA's sole product is browsers, and the Company does not have the financial muscles of a large parent company behind it, such as Netscape has in AOL. To secure a competitive marketplace, Opera Software ASA offers to provide the DOJ with its view on the proposed settlement. In this short memo we wish to draw the attention of the DOJ to issues which we find are especially troubling seen both from Opera Software's stance as a browser provider, and seen from the software industry as a whole. It must, moreover, be emphasized that the topics discussed herein does not represent an exhaustive list related to Microsoft's abuse of a dominant position in the browser market.

2. COMPANY PRESENTATION

2.1 Opera Software ASA

Opera Software ASA (hereinafter "Opera") is an industry leader in the development of Web browsers for both the desktop and the embedded Internet markets and ranks number three among the most widely used Internet desktop browsers in the world. Opera is a world leader in the embedded space.

What started in 1994 as a research project at Norway's largest telecom company Telenor ASA, led to the founding of the independent development company Opera Software ASA. The Opera browser has received international acclaim for its small size, speed and stability. Opera has not only survived in a tough market; it has become a rival to the two major browser-makers AOL/Netscape and Microsoft's Internet Explorer.

Opera has grown strongly since its founding. As of November 1, 2001 Opera Software had 100 employees.

2.2 Commercial breakthrough

Opera has had a commercial breakthrough in the years 2000 and 2001. Opera version 5 for Windows, the first version of Opera to be offered as a no-cost ad-sponsored browser, was launched in December 2000, and more than 6 million users from all over the world downloaded and installed Opera by November 1, 2001. During this period Opera also closed several important strategic agreements in the embedded space with some of the world's leading Internet companies. In addition to several still confidential deals, agreements with companies like IBM, Advanced Micro Devices (AMD), Sharp, Symbian, Canal+ Technologies, and Ericsson, have made Opera a well-recognized world leader on browsers for non-Microsoft systems.

2.3 Market and future potential

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The Internet had a breakthrough in the 1990s, with millions of people all over the world becoming accustomed to using this new communication medium. Still, Opera Software believes that the Internet is only in its infancy. Currently, approximately 8 percent of the world's population has access to the Internet, and millions more new users will log on within the next few years.

Not only will the sheer number of Internet users increase; the way the users access the Internet is also most likely to change. Until now, most users have connected through a PC/desktop from home or work, running Microsoft's Windows Operating System. In the near future, the Internet will move out of the confines of the traditional desktop computer and into many new environments, such as that of handheld devices and WebPads. Such devices will be designed to perform specific tasks, whether it is completing work-related tasks in the workplace, or entertainment functions at home.

From being 100 percent focused on the Windows operating system, Opera Software turned its focus in 1998 focus towards this new emerging market of embedded Internet products.

In most cases, embedded Internet products are memory-constrained, and the platforms and applications that run on them have to be scaled to fit the device. Opera has turned out to be the ideal Web browser choice for this platform environment since it's compact and efficient coding has produced a small, fast, and configurable browser. The success of this strategy shift is reflected in the many strategic agreements that Opera Software has entered into in the course of the last couple of years, with the market leaders of producers of embedded Internet products.

Opera Software's development aim is to maximize the commercial results by creating a multi-platform, high quality product. One central aspect of the development strategy is the platform-independent kernel (core), to which thin platform-specific layers are added. This enables the browser to easily be ported to other emerging platforms and simplifies overall maintenance. Opera has been released for several platforms. Currently the Opera family of browsers consists of releases on Windows, Linux/ Solaris, Mac OS, Symbian OS (EPOC), QNX, BeOS/BeIA, OS/2, with other potential ports under continuous commercial review.

3. OPERA AND MICROSOFT

3.1 Introduction

Opera Software has on an equal footing with Netscape been systematically targeted by Microsoft by way of illegal business practices in order to monopolize the browser market, in conflict with US antitrust legislation, cfr. Judge Jackson's findings in the Antitrust Division of the Department of Justice of the United States(1 U.S. Department of Justice, Complaint in Civil Action No. 98 - 1232, May 18, 1998, at <http://www.usdoj.gov/atr/cases/fl700/1763.htm>),

Despite the findings of Judge Jackson, Microsoft's campaign to gain a monopoly over the browser market continues.

Relative to Microsoft, Opera Software is a small company both in terms of finances and staff. In this short memo we wish to draw the attention of the DOJ to issues which we find are especially troubling seen both from Opera Software's stance as a browser provider, and seen from the software industry as a whole.

3.2 Embrace, Extend, Extinguish

3.2.1 Accessibility and unreadability

It is a recognized principle that Internet tools and applications shall respect the standards established by the World Wide Web Consortium (W3C), see below. Such standards are necessary to upkeep in order to maintain the Internet principle that Internet technologies shall be interoperable and accessible to all.

Microsoft claims that it does its utmost in order to comply with the W3C issued standards, while in reality it pursues a conscious policy of embracing only parts of the standards, and thereafter pursuing a strategy of extending the standard, i.e. developing a standard only present in its own browser client Internet Explorer. Thus Web page authors that create web pages to fit Internet Explorer's Internet standards may find that their web pages are not accessible to other browsers and that they in many cases only work on the Windows operating system. Since testing Web pages with several browsers running on several platforms is time consuming and expensive, many Web developers stick to testing and developing only with the current market leader Internet Explorer. In this way Microsoft has gained control over standards which were meant to be open and accessible to all.

Microsoft's purpose with making Internet sites unreadable to browsers that do not have access to the developments added by Microsoft is to motivate or force the users that do not use Internet Explorer and Windows to convert.

Gaining control over the browser market again provides for possibilities to direct users to Microsoft's own Web properties, such as the MSN portal. In this way Microsoft will gain control over much of the Internet traffic, and thereby making the situation of its Internet competitors, such as Opera Software, increasingly more difficult.

3.2.2 The World Wide Web Consortium

It is in the interest of Internet users that the Internet shall be accessible to all no matter the software used to access the net. In order to keep up the speed of the development of universal, converging infrastructure on the Internet, consensus is needed among developers on what languages may be used and the sets of rules needed for communication computer-to-computer. The World Wide Web Consortium [W3C.org] (hereinafter "W3C") is the Web's international standardization body created to ensure a convergent development of the technical aspects of the Web. The W3C develops and coordinates common languages and rules for the Web, to ensure the W3C's long term goals:

Universal Access

To make the Web accessible to all by promoting technologies that take into account the vast differences in culture, education, ability, material resources, and physical limitations of users on all continents.

Semantic Web

To develop a software environment that permits each user to make the best use of the resources available on the Web.

Web of Trust

To guide the Web's development with careful consideration for the novel legal, commercial, and social issues raised by this technology.

Opera Software is an active participant in developing the Web to its full potential through the active participation of its Chief Technology Officer, Håkon Wium Lie, a member of the W3C's Advisory Board.

3.2.3 Opera's compliance with the W3C standards

No browser is a 100 percent in conformity with the W3C standards. There is an industry tolerance for slight divergences. These must however not represent a conscious act to further develop the standards, and thereby making the developments inaccessible for other standard compliant products. Opera Software respects the open standard policy, and is today to a great extent fully compliant with the standards set by the W3C.

3.3 Control of browser - control of Internet traffic

Recently, Microsoft introduced an update to its portal MSN.com.

A portal is an electronic gateway to the Internet. The portal is really an extension of the search engine idea, but instead of providing lists of sites matching someone's search criteria it relies on a selection process to choose starter sites that new users might be interested in visiting.

Portals try to create stickiness (making surfers visit and then getting them to return again), and do so by providing a range of information on services and entertainment that will encourage visitors to return. The information provided might include a directory of other sites, a search facility, a weather service, chat rooms, free e-mail and a selection of sports, cinema and other entertainment sites.

The MSN.com portal and the Microsoft.com Web sites are some of the most visited Web properties on the Internet. It is therefore of vital importance that all browsers are given full access to the site on equal terms.

This is further underlined by Microsoft's recent linking between its operating system and the MSN: Microsoft has an almost perfect monopoly in the market for operating systems, and uses this position to increase the traffic on the MSN.com portal. The new Windows XP is thus full of hooks, which directs traffic to MSN.com.

Opera Software was earlier this year alerted by users that the newly released version of MSN denied access to Opera both from the main page itself, as well as to links leading to subsections of the portal. The MSN server was thus checking which browser was being used, and programmed so as not to give Opera users full access. In effect the Opera browser and its millions of Internet users were blacklisted.

Microsoft admitted that it was watching out for so-called Opera strings (the identification of the browser sent from the browser to the server), but stated that it did so to encourage people to use a standard-compliant browsers. Microsoft claimed for example that Opera did not follow the XHTML standard. This is incorrect, as Opera in fact has excellent support for XHTML. It is in general incorrect that Opera is not standard compliant as the Opera browser is well known in the market for its adherence to standards set by the W3C.

The misplaced criticism raised by Microsoft against the Opera browser is in fact applicable to the MSN site itself, as it is far from following the W3C standards of web development. The standards are broken consistently on every page, and the blocking out of Opera users must therefore be seen as a conscious policy to manipulate the users to leave the Opera browser and swap to Internet Explorer.

After a media uproar, Microsoft promised to fix the problem of non-accessibility for the Opera browser. Some items have been fixed (the one's mentioned in Opera's press release on the issue) but Microsoft has now again reverted to the same tactics, but in a less obvious manner, by hiding their targeting of Opera in subcategories, or by giving Opera users identifying as an Opera browser user a slightly distorted version of the web page presented to Internet Explorer user. Opera Software worries that if the current pressure towards Microsoft to end its anticompetitive behavior ends without a serious legal reaction, no public uproar will manage to make Microsoft backtrack in its determination to get control of the browser market.

3.4 Predatory pricing

Microsoft has an almost perfect monopoly on operative systems for PCs. Judge Jackson found that from 1998-99, Windows has held a market share of at least 95 %. There is reason to believe that market share has increased since. Against the background of a high percentage of the market, Microsoft's pricing behavior, the fact that there are no viable alternatives to Windows, as well as Microsoft's behavior towards other firms, Judge Jackson concluded that Microsoft had monopoly power.

Microsoft is known to use its monopoly power to maximize its profits where it holds a factual monopoly, while it sells products at a loss in markets where it is not in a monopoly position, the purpose of such pricing policy being to gain market share and market power in markets where it does not hold a monopoly. Opera alleges that this practice amounts to predatory pricing.

The fact that Internet Explorer was included in Windows for free, had the result that Microsoft managed to take 40-45 % of the browser market from the end of 1996 to late 1998, while Netscape's market share dropped from around 80 % to about 55 % in the same period. Today, three years later, Internet Explorer has a market share close to 90 % of the market and Netscape barely 10 %. The consequences of this price policy have thus been dramatic.

Microsoft is now pursuing the same policy with respect to its operating system for embedded products, the so-called Windows CE / Pocket PC. The price for the new Windows XP for the desktop market

has recently dramatically increased, while the price for Windows CE on the other hand is much lower.

There is no objective reason for this dramatic difference in price. Windows CE builds on the same platform as Windows XP, but is designed to take up less storage space in order to be more adapt to the limited storage capacity of embedded products. There is thus reason to believe that there is no correlation between the cost of developing Windows CE and the price currently being charged. Opera Software is of the opinion that the price charged for Windows CE is probably below the average variable cost, and may pursuant to the Areeda-Turner Test be classified as predatory pricing.

3.5 Tying

The allegation of predatory pricing is closely linked to Microsoft's practice of tying products.

Opera Software alleges that operative systems and browsers are separate products, without any natural or necessary link. Microsoft's inclusion of Internet Explorer in its operative system Windows thus amounts to an illegal tying of products.

Microsoft's practice in the desktop market is well known to the States, as Judge Jackson's findings in the case against Microsoft in the United States discusses this issue in depth. The company's practice has, over a period of five years, increased the market share in the browser market from close to zero to almost 90 percent.

Microsoft is still practicing the tying of Internet Explorer to the operating system Windows: The newly released Windows XP contains the latest version of Internet Explorer.

3.6 The server market

Apart from controlling the market for operating systems, browsers and some of the world's largest Web properties, Microsoft is also a dominant and aggressive player in the server market. This position has been used to harm Opera Software, and with Microsoft's growing dominance in this market, the future provides for even greater opportunities for misuse of market power.

A dominant position in the server market gives Microsoft the possibility to abuse its position in the following manner: It is technically speaking an easy operation to program the server's software to only give users of the Internet Explorer browser access to web sites. Microsoft has done this in the past, and only relented after Opera Software raised this issue with Microsoft directly. The problem is however yet not fully solved, as users of Opera have to mask their browser as Internet Explorer in order to get full access. Opera Software worries that if the public pressure of antitrust fades away without a serious legal reaction, nothing will stop Microsoft from effectively closing Opera browser users out from millions of Web sites around the world.

3.7 Consequences of Microsoft's business practices

The business effect of Microsoft's business practices with regard to the points discussed in the above have been severe. Many of Opera Software's potential partners have chosen not to enter into cooperation with Opera Software due to an expressed fear about becoming subject to a campaign by Microsoft by themselves being "blacklisted".

Due to the confidential nature of these negotiations Opera Software is, as yet, not able to provide examples hereof.

4 REMEDY

4.1 Proposed remedy in settlement

Opera Software alleges that its market share would have been considerably higher in the present situation, had not Microsoft continuously practiced a policy of predatory pricing, illegal tying of products, extension of open standards and manipulation of the server market. Opera Software further alleges that its present market position will be severely damaged if the present illegal business practices by Microsoft are not curbed.

In the view of Opera Software the proposed settlement will not stop Microsoft from continuing its abusive tactics for dominance and monopoly power, to the detriment to all Internet innovators. In addition, the settlement is not a punishment for Microsoft's predatory behaviour.

4.2 Opera's suggestions for remedies

In the view of Opera Software, a series of actions need to be taken towards Microsoft, to reflect the damage they pose to the entire computer industry.

4.2.1 Standards compliance

Microsoft must be forced to follow the international, open standards set by organizations like the W3C. Microsoft would have to follow these standards to the letter, not partially or by introducing proprietary standards under the guise of "innovation." Only with that measure in place can Microsoft's practice of "embrace, extend, extinguish" be put to a halt.

To ensure compliance, an independent body should be able to check all Microsoft products before their public release.

4.2.2 Competing browsers

To ensure a competitive browser market, Microsoft should bundle Netscape and Opera in all their Operating Systems.

4.2.3 Stripped Windows at lower price

Microsoft should be required to offer only an unbundled version of their Operating Systems, meaning that browser, mail client, streaming media, etc. would be excluded.

The extra Microsoft applications can then be offered in a separate packages, but no tying of the application packets and Operating System should be allowed.

4.2.4 No blacklisting on servers

Also, because of Microsoft's position also in the server market, the Company must be held to promise that it will stop identifying what browser is used to access its servers, to avoid blacklisting competitors.

4.4.5 Pricing

The price of Windows CE and Windows should be the same, or Windows CE should cost more as it includes more applications.

The proposed solutions should all be simple for Microsoft to introduce, while at the same time opening the marketplace to true competition, restoring a balance to the marketplace for the benefit of the whole computer industry as well as all computer users.